IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EDUARDO YATCO, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 08C-12-038 JRS
	)	
NANTICOKE MEMORIAL HOSPITAL, INC.,	)	
	)	
	)	
Defendant.	)	

Date Submitted: March 18, 2010
Date Decided: June 10, 2010

MEMORANDUM OPINION.
*Upon Consideration of Defendant Nanticoke Hospital, Inc.'s Motion for Summary Judgment***.**
GRANTED.

Robert D. Goldberg, Esquire, BIGGS & BATTAGLIA, Wilmington, Delaware. Attorney for Plaintiff.

David R. Hackett, Esquire, GRIFFIN & HACKETT, P.A., Georgetown, Delaware. Attorney for Defendant.

SLIGHTS, J.

I.

This case arises out of a decision by the Board of Directors ("the Board") of Nanticoke Memorial Hospital, Inc. ("Nanticoke" or "the hospital") to suspend the performance of a surgical procedure (carotid endarterectomy ("CEA")) within the hospital. A surgeon at the hospital, Dr. Eduardo Yatco ("Dr. Yatco" or "Plaintiff"), has initiated this action against the hospital in which he alleges that the Board suspended his surgical privileges to perform CEAs without the due process required by the hospital's by-laws and related documents. He also alleges that the Board's explanation of a hospital-wide suspension of CEAs (rather than a targeted suspension of his privileges) was intended as a pretext to mask its intent to limit his right to perform surgeries at the hospital.

The complaint contains two counts, one for breach of contract and one for breach of the covenant of good faith and fair dealing.[1] Nanticoke has moved for summary judgment on both counts alleging that the undisputed facts reveal that its decision to discontinue the performance of CEAs within the hospital was a valid business decision made in the exercise of the Board's business judgment. Because the Court agrees that Dr. Yatco has failed to present any facts that would allow a

[1] Count III of the complaint alleged tortious interference with existing and prospective contracts. That count was dismissed by the Court on April 16, 2009, however, and is not at issue for purposes of this Motion. *See* Compl. ¶¶ 40-45; Hr'g Tr. 36, April 16, 2009.

reasonable fact-finder to conclude that Dr. Yatco's surgical privileges were improperly restricted, or that the Board's stated purpose for its decision was not its true purpose, Nanticoke's Motion must be **GRANTED.**

II.

A. The Hospital's Corporate Structure and Governing Documents

Nanticoke is a not-for-profit corporation with a single shareholder, Naticoke Health Services, Inc., which acts through the Board. The Board has the same rights and duties as the board of directors of any other corporation, and operates under the hospital's corporate by-laws.[2] These by-laws give the Board the power, right and duty, *inter alia*, "[t]o determine what operations and services the Hospital will provide or discontinue . . . ."[3] Separate from the Board, the hospital's physicians are organized as a formal Medical Staff, comprised of all physicians with privileges at the hospital. The Medical Staff is governed by its own separate by-laws.[4]

The Medical Staff follows a written "Credentials Policy," which establishes the procedure for granting or denying privileges to physicians seeking appointment and

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[2] App. to Def.'s Opening Br. (Transaction ID ("Tr. ID") 29302890) A58 § 3.1.A (Hospital By-laws).

[3] *Id.* at A59 § 3.2(C).

[4] *Id.* at A64-69 §§ 7.1-7.8.

reappointment to the Medical Staff.[5] The Credentials Policy, administered by the Credentials Committee, provides for certain safeguards before a physician can be denied appointment or reappointment to the Medical Staff, including the right to request a hearing.[6] If a hearing is conducted, the Credentials Committee makes findings and recommendations at the conclusion of the hearing and submits them to the Medical Executive Committee ("the MEC"), which either adopts the Credentials Committee's findings and recommendations or takes other action.[7] The MEC ultimately sends its findings and recommendations to the Board, which either adopts them, sends them back to the MEC for additional review, or rejects or modifies them.[8]

B. Plaintiff's Application for Reappointment to the Hospital's Medical Staff and Request for Privileges to Perform Carotid Endarterectomies

On August 22, 2006, Dr. Yatco applied for reappointment to the Medical Staff and renewal of clinical privileges for a two-year term beginning January 1, 2007.[9] The Credentials Committee first reviewed Dr. Yatco's application and accompanying documentation at its October 9, 2006, meeting. CEA was among the procedures for

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[5] *See generally* A70-143 (Credentials Policy).

[6] *Id.* at A126-41 §§ 7A-E.

[7] Anthony Aff. A1-2 ¶ 4.

[8] *Id.*

[9] A167-68 (Reappointment Information Form).

which Dr. Yatco sought surgical privileges.[10] The minutes of the Credentials Committee's October 9 meeting reflect that members were concerned about the low volume of CEA procedures performed at the hospital.[11] Apparently in response to these concerns, the Credentials Committee tabled further discussion of Dr. Yatco's application until its November, 2006 meeting.[12]

On October 18, 2006, the MEC met and discussed, *inter alia,* Dr. Yatco's application to continue performing CEAs at the hospital.[13] Like the Credentials Committee, the MEC reviewed the number of CEA procedures performed at the hospital (including those done by Dr. Yatco) over a two year period and concluded that the number was well below the national average. Because the MEC was concerned, given the low numbers, that its staff (including the surgeon) might not be competent to continue performing CEAs, the MEC asked Dr. Yatco (by letter dated November 7, 2006) to consider voluntarily withdrawing his request for privileges to

[10] Anthony Aff. A4 ¶¶ 12-14.

[11] *Id.*

[12] *Id.*

[13] *Id.* at A6-7 ¶¶ 19, 22.

perform the procedure.[14] When Dr. Yatco did not respond to the MEC's request, the Credentials Committee decided at its November 13, 2006, meeting to recommend approval of Dr. Yatco's request for reappointment to the Medical Staff and renewal of all clinical privileges except CEA privileges, which it left open for decision at a later time.[15] The MEC adopted this recommendation at its November 15, 2006, meeting.[16]

On December 7, 2006, the Board adopted the MEC's recommendation that Dr. Yatco be reappointed to the Medical Staff "with exception of Cerebral angiograms and [CEAs]."[17] Dr. Yatco was informed of this decision in a letter dated December 7, 2006.[18] The issue of whether Dr. Yatco should receive privileges to perform CEAs remained open after December 7, 2006, as evidenced by the further discussion of the issue at the Credentials Committee's January 8, 2007, meeting.[19]

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[14] *Id.* The data reviewed by the MEC revealed that Dr. Yatco's performance of CEAs had dropped from twenty-one procedures between 2002-2004 to five procedures between 2004-2006. The national recommendation is that surgeons and facilities perform between ten and fifty procedures per year to remain competent. *Id.* at ¶ 19.

[15] *Id.* at A7 ¶ 22.

[16] *Id.* at ¶ 23.

[17] *See* A182-83 (Board Meeting Minutes (Dec. 7, 2006)); Anthony Aff. A8 ¶ 26.

[18] A184 (Letter from Douglas J. Connell, President & CEO, Nanticoke Health Services, Inc., to Dr. Yatco (Dec. 7, 2006)).

[19] *See* A185-86 (minutes of the Credentials Committee meeting reflecting discussion of Dr. Yatco's request for CEA privileges and noting that the issue remained "Open").

In a letter to the MEC dated January 16, 2007, Dr. Yatco objected to the Board's failure to renew his privileges to perform CEAs, and requested that the MEC reconsider the issue and recommend restoration of these privileges.[20] The MEC met again on January 17, 2007. After noting that Dr. Yatco had been performing CEAs for years, the MEC determined that it would recommend that the Board approve Dr. Yatco's CEA privileges.[21] Nevertheless, the MEC reiterated its concern regarding staff competency to perform CEAs given how few had been performed over the past several years and, accordingly, the MEC recommended that the hospital review its ability to support CEA services under the Joint Commission guidelines.[22] This was the first time the MEC made any definitive recommendation to the Board with respect to Dr. Yatco's request for CEA privileges.

The Board met on January 25, 2007, and ultimately decided: (1) to approve Dr. Yatco's request for privileges to perform CEAs;[23] and (2) that the hospital could not "maintain competency in the staff that is needed to support CEA."[24] Accordingly, Dr. Yatco was advised that the hospital would not support the performance of CEA

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[20] A187.

[21] A188-90 (MEC Meeting Minutes (Jan. 17, 2007)); Anthony Aff. A9 ¶ 30.

[22] *Id.*

[23] *See* A191.

[24] *See* A192.

procedures in the future unless "at some point it appears that there will be a significant increase in the number of [CEAs] performed . . . ."[25] Writing on behalf of the Board, Dr. Douglas Connell, President and CEO of Nanticoke, emphasized to Dr. Yatco that the Board's decision to discontinue CEA services at the hospital was not intended "as a statement on [his] ability to perform the procedure."[26]

III.

The gravamen of Nanticoke's Motion is that the Board made a business decision when it determined to discontinue CEAs at the hospital and that this decision was not controlled by or connected to the Credentials Policy. As such, the decision was not subject to the notice or hearing provisions contained within the Credentials Policy.[27] According to Nanticoke, Dr. Yatco's competency to perform CEAs did not influence the Board's ultimate decision, and the MEC never made a recommendation to the Board that Dr. Yatco's request for privileges to perform CEAs be denied.[28] Indeed, Nanticoke asserts that neither the Credentials Committee, the MEC nor the Board ever once suspended Dr. Yatco's surgical privileges. Rather, the Board

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[25] *Id.*

[26] *Id.*

[27] Def.'s Opening Br. 20.

[28] Anthony Aff. A10 ¶¶ 34-36.

approved Dr. Yatco's request for CEA privileges, but determined that the hospital would no longer support that procedure. Therefore, Nanticoke argues that the Board made a business decision that is not subject to Dr. Yatco's challenge or the Court's review.[29]

Not surprisingly, Dr. Yatco disagrees. He argues that Nanticoke's characterization of its actions as a "business decision" unrelated to credentialing is misplaced. Rather, he contends that the Board was trying to "backdoor" a credentialing decision without affording him the rights guaranteed under the hospital by-laws and the Credentials Policy.[30] He further argues that the Board's December 7, 2006, letter was, in effect, a denial of his CEA privileges that triggered his right to a hearing under the Credentials Policy and other relevant guidelines.[31]

IV.

In deciding a motion for summary judgment, the Court must determine whether genuine issues of material fact remain for trial.[32] Summary judgment will be granted only if no genuine issue of material fact exists and the moving party is entitled to

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[29] Def.'s Opening Br. 21-22.

[30] Pl.'s Answering Br. 11.

[31] *Id.* at 10-11.

[32] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

judgment as a matter of law.[33] If the record reveals that material facts are in dispute, however, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment must be denied.[34]

The moving party bears the initial burden of demonstrating that the undisputed facts support his claim for dispositive relief.[35] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that material issues of fact remain for resolution by the ultimate fact-finder and/or that the movant's legal arguments are unfounded.[36] In this regard, "Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case."[37]

The Court "will accept as established all undisputed factual assertions, made by either party, and accept the non-movant's version of any disputed facts. From those accepted facts the court will draw all rational inferences in favor of the

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[33] *Id.*

[34] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[35] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

[36] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[37] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

non-moving party."[38] The presumption afforded the non-moving party in the summary judgment analysis, however, is not absolute. The Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based.[39] "A party opposing summary judgment . . . may not merely deny the factual allegations adduced by the movant. If the movant puts in the record facts which, if undenied, entitle him to summary judgment, the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight."[40] To determine whether the non-moving party has satisfied its burden, the Court asks "whether a reasonable juror could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."[41] "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there

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[38] *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted).

[39] *See Eramdjian v. Interstate Bakery Corp.*, 315 P.2d 19, 25 (Cal. Dist. Ct. App. 1957) ("A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established. It is axiomatic that 'an inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork.'") (internal citation omitted) (quoting 18 Cal. Jur. 2d 480)).

[40] *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Hurtt v. Goleburn*, 330 A.2d 134, 135-36 (Del. Super. 1974)).

[41] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (internal citations omitted).

must be evidence on which the jury could reasonably find for the [non-moving party]."[42]

V.

A. The Court Need Not Address Whether The Hospital's By-Laws Create A Contract Between Staff Physicians And The Hospital

Dr. Yatco's claims for breach of contract and breach of the implied covenant of good faith and fair dealing both presuppose that Naticoke's by-laws and its Credentials Policy create contract-like obligations on the part of the hospital to physicians on its Medical Staff. Whether a hospital's by-laws (and related documents) constitute a contract between the hospital and individual members of the medical staff remains an open question under Delaware law.[43] Because the Court finds that the by-laws (and related documents) were not implicated by the hospital's business decision to discontinue CEA services, the Court will leave the resolution of this open question for another day.

B. Dr. Yatco Lacks Standing To Challenge The Board's Decision To Discontinue CEA

In support of its Motion, Nanticoke offered the detailed sworn affidavit of Harry Anthony, Jr., M.D. (the "Anthony affidavit"), along with supporting

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[42] *Id.*

[43] *See Lipson v. Anesthesia Services, P.A.*, 790 A.2d 1251, 1284 n.68 (Del. Super. 2001).

documents.[44] Dr. Anthony is an active member of the Medical Staff and was a member of the Credentials Committee and the MEC during the pendency of Dr. Yatco's application for reappointment to the Medical Staff.[45] The evidence offered by Nanticoke, including the Anthony affidavit, establishes that the Board made a non-reviewable business decision to discontinue all CEA procedures within the hospital because it was not satisfied that its staff had the experience and/or training to continue to perform the procedure. Contrary to Dr. Yatco's argument, the undisputed record reveals that the Board never denied his application for privileges to perform CEAs. Indeed, the Board ultimately determined to renew his CEA privileges and assured him that it would revisit the issue of whether the hospital would support the procedure if it was presented with evidence that "there will be a significant increase in the number of [CEAs] performed" at the hospital.[46] Having granted his application for reappointment and his request for surgical privileges, there was no reason to offer or to conduct a hearing with respect to Dr. Yatco's staff privileges.

To rebut Nanticoke's argument, Dr. Yatco offered nothing by way of record

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[44] *See generally* App. to Pl.'s Opening Br.

[45] Anthony Aff. A1-2 ¶¶ 1, 5.

[46] A192.

evidence or sworn testimony (by affidavit or otherwise).[47] Instead, when providing factual cites in his brief, or when his counsel was pressed to provide record support for the fundamental factual assertions in support of his claims, Dr. Yatco pointed only to the unverified allegations in his complaint.[48] While this approach was adequate to defeat Nanticoke's earlier-filed Motion to Dismiss the complaint, bald references to one's unverified complaint, without more, will not defeat a properly supported motion

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[47] Apparently, Dr. Yatco took little discovery and was not himself ever asked to give a deposition. Nor has he submitted an affidavit from himself or any other witness to answer the Anthony affidavit.

[48] *See, e.g.*, Pl.'s Answering Br. 2, 4, 11. The only exhibits Plaintiff appended to his Answering Brief are a document entitled *Evidence-Based Hospital Referral: High-Risk Surgery* (Ex. A), Defendants' Response to Plaintiff's First Request for Production of Documents (Ex. B), Defendants' Answer to Plaintiff's Interrogatories Directed to Defendant (Ex. C), a Memorandum to the Medical Staff Re: Louis Queral, MD Vascular Surgeon Visit (Ex. D), and the February 4, 2008 Department of Surgery meeting minutes (Ex. D). None of these documents or other items directly or circumstantially support Dr. Yatco's breach of contract claim or his claim that the decision to discontinue CEA procedures was made in bad faith. While Dr. Yatco's Answering Brief does briefly discuss the two documents contained in Exhibit D in the context of his bad faith claim, Dr. Yatco does not explain how the post-decision events discussed in those documents – namely the hospital's subsequent decision to hire a new cardiovascular surgeon in late 2007 or early 2008 and credential him to perform CEAs – is evidence that bad faith motivated the January 25, 2007, decision to discontinue CEA. In fact, the events discussed in the two documents merely indicate that Nanticoke did exactly what it told Dr. Yatco it would do – it reconsidered the discontinuation of CEA services after a showing that a sufficient number of procedures would be performed to justify retraining the staff. *See* A197 ("At some future time, there may be sufficient volume to support retraining, and at that time you will be eligible to apply."). Had Dr. Yatco presented any evidence that the plan to hire a new surgeon was actually conceived prior to the Board's decision to discontinue CEA services, and that the plan was intended somehow to affect his surgical privileges at the hospital, then there might be a factual basis upon which a reasonable juror could infer the bad faith necessary to support Dr. Yatco's bad faith claim. On the current record, however, the Court does not see, and Dr. Yatco has not explained, how the documents appended to his Answering Brief support his allegations of bad faith.

for summary judgment.[49] When pressed at oral argument to move beyond the complaint to support Dr. Yatco's claims, counsel relied primarily on Nanticoke's appendix to its Motion, indicating that he would not reproduce documents that had already been provided.[50] He failed, however, to explain how the letters and other exhibits appended to the Motion – all of which reveal that Dr. Yatco was never denied CEA privileges – support a breach of contract or bad faith claim against the hospital.[51]

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[49] Super. Ct. Civ. R. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."). *See also Hart v. Resort Investigations & Patrol*, 2004 WL 2050511, at *6 (Del. Super. Sept. 9, 2004) ("Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial."); 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.13[2] at 56-173 to -74 (3d ed. 1997) ("The nonmoving party must bring forward 'significant probative evidence' to support its efforts to defeat the summary judgment motion. Rule 56(e)(2) specifically precludes the nonmovant from relying merely on allegations or denials contained in its pleadings. It is likewise insufficient for the nonmovant to rely on mere conclusory allegations or denials, or to present unsworn documents or papers containing nothing more than the nonmovant's speculations."); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2727 at 499, 510 (1998) ("When the burden of showing the existence of a factual dispute shifts to the nonmoving party, he cannot satisfy that burden by relying on mere allegations in the pleadings to show that there is a triable issue . . . . [e]vidence in opposition to the motion that clearly is without any force is insufficient to raise a genuine issue.").

[50] *Cf.* Pl.'s Answering Br. 3 n.2 (referring to Nanticoke's appendix). As of this writing, a certified copy of the hearing transcript is not yet available. Nevertheless, the Court's recollection of this exchange with counsel is clear.

[51] *See id.* at 2-4.

Even viewing the facts in a light most favorable to Dr. Yatco, the undisputed record reveals that as of December 4, 2006, the Board had not yet made a final decision with respect to Dr. Yatco's request for CEA privileges.[52] The undisputed record also reveals that *subsequent* to the December 7, 2006, letter that Dr. Yatco claims evidences the Board's decision to deny his CEA privileges, the Board, the MEC, and the Credentials Committee all continued their discussions about the future of CEA services at the hospital generally *and* Dr. Yatco's request for CEA privileges specifically.[53] When the Board did decide, it decided to renew Dr. Yatco's surgical privileges but to discontinue supporting CEAs at the hospital until such time as it was satisfied that the number of CEAs to be performed would justify the substantial resources needed properly to train staff and ensure competence.[54] Dr. Yatco's contention that his privileges were denied on December 7, 2006, finds absolutely no support in the record. As Dr. Yatco has the burden of presenting competent evidence

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[52] *See* A48 (Letter from Harry Anthony, Jr., MD, Chair, Credential Committee, to Plaintiff (Dec. 4, 2006)) ("The committee to this point has not made any decision on your credentials for the two procedures in question. We will need to either have you withdraw your request, or have us consider the request. Please let me know."). Plaintiff never responded to this request, which included an offer to take Plaintiff's concerns to the Credentials Committee if he could provide "evidence that [the Credentials Committee's] numbers are incorrect" or if he could "find specific recommendations which differ from [the Leap Frog recommendations cited] above." *Id. See also* Anthony Aff. A7-8 ¶ 25.

[53] *See* A185-86 (Credentials Committee Meeting Minutes (Jan. 8, 2007)), 188-89 (MEC Meeting Minutes (Jan. 17, 2007)), 193-94 (Board Meeting Minutes (Jan. 25, 2007)).

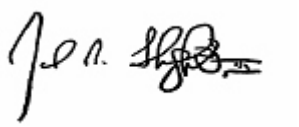
[54] A192.

to counter the Anthony affidavit, and the contemporaneously prepared documents of the Credentials Committee, the MEC and the Board, his failure to produce any counter evidence is fatal to his claims. Simply stated, the Court can discern no issues of disputed fact for trial.

VI.

The undisputed record supports Nanticoke's argument that it did not deny surgical privileges to Dr. Yatco but instead made a decision in the exercise of its Board's business judgment to discontinue the performance of CEA procedures at the hospital until such time as the number of procedures to be performed would justify the resources necessary to train staff competently to perform the procedure. Dr. Yatco has no legal basis or standing to challenge this business decision, through a breach of contract claim, bad faith claim or otherwise. Consequently, Nanticoke's Motion for Summary Judgment must be **GRANTED**.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

JRS, III/sb
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